80-234

Supreme Court, U. S.
FILED
AUG - 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. _____

JAMES RODNEY ADKINSON,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED FOR REVIEW

A. Whether Adkinson was denied due process of law through the destruction by agents of the state of evidence favorable to the accused.

B. Whether Adkinson was denied due process of law by presentation by the prosecution of false evidence and distortion of the trial through the insertion of irrelevant and false issues by the prosecution.

C. Whether Adkinson was denied due process of law by the improper admission of evidence of alleged similar acts.

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I
STATEMENT OF JURISDICTION

The Petitioner respectfully prays that a Wirt of Certiorari issue to review the judgment and opinion of the Alaska Supreme Court entered in this proceeding on May 9, 1980, reported at 611 P.2d 528.

An Order of the Alaska Supreme Court denying rehearing was entered on June 5, 1980. Copies of the Order denying rehearing, the Opinion of the Alaska Supreme Court, and the Judgment and Commitment entered by the Superior Court on May 12, 1977 are set forth in the Appendix hereto. Adkinson is being held in custody pursuant to the Judgment and Commitment, having surrendered himself as required by the court on June 23, 1980.

This Petition is being filed within 60 days of the denial of the timely Petition for Rehearing. This court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

II
QUESTIONS PRESENTED FOR REVIEW

A. Whether Adkinson was denied due process of law through the destruction by agents of the state of evidence favorable to the accused.

B. Whether Adkinson was denied due process of law by presentation by the prosecution of false evidence and distortion of the trial through the insertion of irrelevant and false issues by the prosecution.

C. Whether Adkinson was denied due process of law by the improper admission of evidence of alleged similar acts.

III

CONSTITUTIONAL PROVISION APPLICABLE

The applicable portion of Amendment XIV to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of liberty, life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is Adkinson's contention that the State of Alaska has deprived him of liberty without due process of law.

IV

STATEMENT OF THE CASE

The indictment in this matter (CR 1)[1] was returned by the Grand Jury on October 21, 1976 charging Adkinson in Count I with manslaughter under AS 11.15.040 and in Count II with negligent homicide under AS 11.15.080.

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1. References to the Clerk's Record will be made in this Petition by the abbreviation CR.

The case was tried in Superior Court at Anchorage, Alaska, before Hon. Victor D. Carlson, commencing on March 8, 1977 (RT 3)[2]. The jury returned a verdict of guilty as to Count I and not guilty as to Count II on March 23, 1977 (CR 92; RT 1874).

Judgment and Commitment was entered on May 12, 1977 sentencing Adkinson to 10 years in custody with parole at the discretion of the parole board (CR 104).

Timely appeal was made to the Alaska Supreme Court, which affirmed the conviction.

At the time of the trial, Adkinson was 51 years of age (RT 965) and he resided with his wife of 23 years (RT 973) on a homestead which the Adkinsons located in 1967 (RT 975) in an unsurveyed area near the Knik River, later to become mile 10.5 Knik River Road (RT 965, 977). The Adkinsons had lived in cabins on the property for approximately 10 years as of the time of trial and they considered it the most beautiful place in the world (RT 981).

Prior to the accident which resulted in the charge against Mr. Adkinson, he had sustained injuries to his nerves along his spinal column which impaired many of his bodily functions and particularly made it difficult for him to control his right hand (RT 1020, 1277). In fact, his right hand lost almost all grip strength (RT 778).

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2. References to the Reporter's Transcript will be made in this Petition by the abbreviation RT.

The homesteaders along the Knik River Road, over the years since the road was built, had considerable difficulties with uninvited visitors to their properties, most of whom were armed and some of whom were careless and/or belligerent (RT 858-932).

On October 9, 1976, Adkinson noticed unoccupied vehicles at the turnaround point in the Knik River Road, which point is located on a state easement on Adkinson's property (RT 1005, 1246). One of the vehicles was parked between two no trespassing signs and probably off the state easement (RT 1006, 1246). On the morning of October 10, 1976, while Adkinson was spreading scent along his trapline, he saw smoke rising about two miles up river and through field glasses he saw three men there and he heard considerable shooting (RT 1013). Late that afternoon, Adkinson had a bad headache and was lying down in bed. He and Mrs. Adkinson heard their dogs barking and they could hear voices outside (RT 1014, 1278). Adkinson got up, dressed and went outside, taking his shotgun with him (RT 1014, 1279). The shotgun was a replica of the type of gun used on stagecoaches in the old west and it had only been fired once in each barrel to test it. It had exterior hammers (RT 1015, 1018). Adkinson saw three people coming toward him through the trees from the side of his property up the river and opposite the road (RT 1021). A confrontation resulted between Adkinson and Steven Butts (RT 1025, 1283-1291). The Adkinsons testified that

during the confrontation, the shotgun was pointed down and to the side of Butts (RT 1028), and that Butts grabbed the gun, causing it to point at him and to discharge, though, according to Adkinson, it had not been cocked (RT 1028, 1254, 1292, 1314, 1320). One of the witnesses with Butts testified that the muzzle of the gun had been pointed at Butts (RT 191). Mrs. Adkinson likewise testified that the gun was neither cocked nor pointed at Butts, but he grabbed it and jerked it toward him just before it discharged (RT 1292, 1314, 1320). Immediately thereafter, as Adkinson was attempting to render assistance to Butts, he stated that if Butts had not grabbed the gun, it would not have gone off (RT 120). The discharge of the shotgun caused near total destruction of the lower aspects of Butts' left lung and hemorrhaging which resulted in Steven Butts' death on the way to the hospital (RT 120, 621).

The evening after the accident, Adkinson gave a full account of the incident to Alaska State Trooper Gary L. Lewis, including an account of Butts having grabbed the gun just before it discharged (RT 354). Nevertheless, when Trooper Lewis went to Adkinson's cabin in company with Adkinson and Adkinson's son-in-law, the trooper picked up the gun and handled the barrel as he opened it and looked through it from both ends, despite objections by Adkinson and his son-in-law that the gun was evidence (RT 1043, 1229, 1341). Upon returning to his office, Trooper Lewis completely

disassembled the shotgun, handling the barrel extensively (RT 1043). It did not occur to him that the weapon should be taken care of in a way to preserve any fingerprints on the barrell, which may have been made by Butts, as substantiation for Adkinson's statement about Butts grabbing the gun by the barrell (RT 354). Lewis acknowledged picking up the gun at a time when he had not seen anyone else handle it (RT 357) and that he stripped it down at his office (RT 360). When the shotgun was delivered to the state's fingerprint expert, it had a manilla envelope over the end of the barrell (RT 634-637). The expert found fingerprints near the end of the gun barrel which he identified as the prints of Trooper Lewis (RT 637, 646), but he was unable to find any other identifiable prints on the gun barrel (RT 646). The fingerprint expert had not been advised that Trooper Lewis had handled the gun, but upon observing the cleanliness of the barrell and the few fingerprints, he became suspicious (RT 656). The expert testified that the barrell of the gun definitely was cleaned or wiped off just before the fingerprints he found were made on the gun barrell (RT 660), and that there were no fingerprints consistent with the trooper having handled the gun to strip it down (RT 659). The expert testified that in order to preserve any fingerprints made on the gun barrell by Butts, it would have been important for the trooper to bag the barrell immediately and never allow anyone or anything to touch it

before delivering it to the fingerprint expert (RT 662). Under the state of the evidence presented to the expert, he could not render any opinion as to whether or not the victim had touched the gun barrel (RT 662), but he did express the opinion that the gun barrel was wiped clean sometime after Trooper Lewis had stripped the gun down and before he placed his fingerprints near the end of the barrell in the locations where they were found by the expert (RT 665).

A gunsmith presented as an expert witness for the defense testified that the shotgun had a serious defect in that the hammer on the right side would not drop into the safety notch and, upon testing, primers fired eight out of ten times without the gun being cocked (RT 717, 730). Had the right hand safety on the gun worked properly, there would have been no accident (RT 739, 754). An expert from the FBI found the same safety malfunction on the right side of the weapon (RT 300), and did not contest the results obtained by the defense expert (RT 337). After the defense expert testified, a state trooper made similar tests of the shotgun, and fired the right barrel eight out of ten times without the gun being cocked (RT 1672).

More than one-third of the two week trial involved a dispute as to the boundary line of Adkinson's homestead and whether or not the accident occurred within the boundaries. Counsel for Adkinson made the first objection to presentation of any evidence on that issue

on the basis of relevance and that Adkinson had been in peaceable possession of the property with approval of the Bureau of Land Management for more than ten years, though the exact boundaries could not be determined until final patent was issued, before opening statements (RT 4). The prosecutor countered that possibly the accident occurred on the public domain, not on Adkinson's homestead (RT 5). Repeated objections were made to the relevancy and competency of any boundary dispute (RT 5, 7, 8, 10, 17, 18, 32, 377, 419, 487, 1545). Nevertheless, the court ruled that the state's surveyor was qualified to give his opinion as to whether or not the accident occurred on Adkinson's property or within the public domain (RT 1541) and allowed the jury to decide the issue (RT 1561). The state's surveyor was allowed to testify that even Adkinson's cabin was not within his homestead, but was in the public domain and that the shooting incident occurred several hundred feet outside the homestead boundary (RT 1480, 1493, 1502).

This evidence presented by the state was proven by the defense to be false through the testimony of three cadastral surveyors from the BLM who testified that a BLM survey of the meander line along the Knik River had been accepted and finally approved by the Department of Interior on November 8, 1976 and that any challenge to the line established by the BLM would be a challenge to an action of the United States government (RT 1689, 1697, 1711,

1719, 1722, 1734, 1738). The state's surveyor based his opinion that the accident occurred within the public domain on his contention that the BLM's determination of the meander line along the river was erroneous and not final. However, since BLM's survey was finally approved several months prior to the trial, the prosecution either knew or should have known, that it was presenting false evidence. Nevertheless, the prosecutor did not withdraw the false evidence he had presented, but persisted in his final argument that Adkinson, . . ."must have had some significant doubt as to whether or not his cabin and 90 feet to the north of his cabin . . . fell within the PLO," (RT 1806). Even the court, at sentencing seemed to adopt the view that the BLM was wrong, stating that Steven Butts "was not a trespasser. And there is substantial evidence that Mr. Adkinson knew that, concerning the public land order withdrawal for public access, was in the vicinity of where Steven was shot", (RT 1942).

On March 4, 1977, prior to commencement of the trial, the defense filed a motion for a protective order against the introduction of evidence concerning purported "similar bad acts" in the prosecution's direct case, or without proper foundation as rebuttal (CR 2). Less than half way through the trial, the court ruled that evidence that Adkinson in the past had pointed a gun at someone would be admitted as going to the credibility of the defendant because Adkinson was expected to

testify that he did not point the gun at Butts on October 10, 1976 and the evidence further would show Adkinson's "habit" in dealing with trespassers (RT 891). The court reiterated that similar acts would be important to show what the defendant did on this occasion by "habit" (RT 894). Later, the court stated that such evidence would be admissible to prove absence of mistake or accident in the pointing of the gun, that whether the defendant usually points a gun at people would be pertinent (RT 939). After the court had made those rulings, Adkinson testified that he did not point the gun at Butts and that he had never pointed a gun at any person (RT 1048, 1257). Subsequent to that, the court commented that similar acts by Adkinson would be admissible on rebuttal with regard to Adkinson's veracity (RT 1356). Adkinson's counsel pointed out that a general denial did not open Adkinson up to the admission of such evidence and beside, the court already had ruled before Adkinson testified (RT 1374).

Thereafter, testimony by the man who did the surveying for the state was admitted that nearly seven years prior to the incident in question, when he first saw Adkinson, Adkinson was pointing a gun at him (RT 1504). He acknowledged, however, that he did not feel menaced by any action of Adkinson (RT 1570) and that Adkinson invited him up to the house for coffee, and they engaged in friendly conversation (RT 1592). He had not considered

Adkinson's conduct unusual or unreasonable on that occasion (RT 1573).

Another witness testified that about four years prior to the accident in question, he had observed Adkinson point a gun at a person in the vicinity of the homestead (RT 1619-1624). That witness had identified Adkinson in a lineup of four persons outside the presence of the jury (RT 1608), and he testified that his recognition of Adkinson was based on the incident which occurred four years earlier and that he had not seen Adkinson other than on that occasion. However, upon being cross-examined in the presence of the jury, that witness testified that he had seen Adkinson near the homestead about a month and a half prior to the trial (RT 1544).

V

ARGUMENT STATING REASON FOR GRANTING THE WRIT

A. ADKINSON WAS DENIED DUE PROCESS OF LAW THROUGH DESTRUCTION BY THE STATE OF EVIDENCE FAVORABLE TO THE ACCUSED.

Clearly Adkinson's shotgun was pointed at Butts at the time it discharged. If it became pointed at Butts as a result of any intentional act by Adkinson, the jury had a basis to find Adkinson guilty of manslaughter, and unlawful killing as provided by AS

11.15.040.[3] Even under the Alaska statute prohibiting careless use of firearms, if Adkinson intentionally pointed the gun at Butts, without malice, and the gun discharged killing Butts, the elements of manslaughter would be present.[4]

On the other hand, if the gun became pointed at Butts through an act of Butts, rather than an act of Adkinson, that would constitute an explanation consistent with Adkinson's innocence. From the instant after the shotgun discharged, Adkinson maintained that the gun became pointed at Butts and discharged because Butts had grabbed it. Had the jury been left with a reasonable doubt that Adkinson's explanation was false, a verdict

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3. A.S. 11.15.040 provides:

Except as provided in §§ 10-30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.

4. A.S. 11.15.200. Careless use of firearms. (a) A person who intentionally, and without malice points or aims a firearm so pointed or aimed at a person, or points and discharges a firearm at or toward a person or object without knowing the identity of the object and maims or injures a human being, is guilty of the careless use of firearms, and upon conviction is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or by both.

of not guilty would have been mandatory.

Had it been possible for Adkinson to establish that Butts' fingerprints were on the barrell of the shotgun, his credibility would have been greatly reinforced and his explanation consistent with his innocence would have created a reasonable doubt which could have resulted in acquittal.

The effect of the Alaska Supreme Court's ruling on this issue is that the unintentional destruction of evidence by the state is not a denial of due process if the evidence destroyed "would not have been exculpatory in itself" and would not have been sufficient to "prove that Adkinson did not point his weapon at Butts," Adkinson v. State, 611 P.2d 528, 534 (Alaska 1980).

By giving weight to the "unintentional" destruction of evidence by the state trooper, the Alaska Supreme Court is at odds with a court of appeals which has held that negligent failure to apply earnest efforts to preserve evidence will provide no excuse, United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971), and the highest court of the State of Washington has followed the ruling in Bryant, State v. Wright, 557 P.2d 1, 7 (Wash. 1976).

Even worse, however, by adopting the standard "exculpatory in itself" and the shifting of the burden to the defense to show that the destroyed evidence would not merely show reasonable doubt, but would prove innocence, the Alaska Supreme Court has made

rulings which conflict with decisions of this court. In United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 9622, 49 L. Ed. 2d 342 (1976), this court held that if the admitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error is present. By convicting Adkinson, the jury demonstrated that it did not entertain a reasonable doubt. However, had Butts' fingerprints been found on the gun barrell, Adkinson's credibility would have been enhanced vastly and a reasonable doubt that did not otherwise exist would have been created. Thus, instead of holding the state accountable only for destruction of evidence which would prove innocence, as the Alaska Supreme Court held in this case, the state should have been held accountable for destruction of evidence which merely would create a reasonable doubt.

The state in Adkinson's case did exactly what was condemned by the court in United States v. Heath, 260 F.2d 623, 629 (9th Cir. 1958). It took evidentiary material (the shotgun) from Adkinson's possession and carelessly, or intentionally, removed any fingerprints which may have been on the gun barrell, thereby substantially impairing the defense, and then the state still claimed the right to prosecute. The court in Heath described such governmental action as "ignoble".

Since the Alaska Supreme Court has applied much different standards in determining the consequences of destruction of evidence

favorable to the accused than have been applied by this court, and the courts of appeals and a highest state court in the decisions cited herein, the Petition for Writ of Certiorari should issue. By the standards applied by other courts, Adkinson has been deprived of liberty without due process of law.

B. ADKINSON WAS DENIED DUE PROCESS OF LAW THROUGH PRESENTATION BY THE STATE OF FALSE EVIDENCE AND DISTORTION OF THE TRIAL THROUGH THE STATE'S INSERTION OF IRRELEVANT ISSUES

The question of the correctness of the BLM's establishment of the meander line and the boundary of Adkinson's homestead was within the sovereign immunity of the federal government and not subject to attack in a state court, Simmons v. Vinson, 394 F.2d 732 (5th Cir. 1968) cert. denied 393 U.S. 968. Thus, more than a third of the trial was totally irrelevant. Furthermore, the testimony by the state's surveyor that the public land survey by the BLM was incorrect, was false testimony, as the official United States survey does not ascertain boundaries; it creates them, Vaught v. McClymond, 155 P.2d 612, 616 (Mont. 1945).

Nevertheless, the attack on Adkinson through insertion of this false and irrelevant evidence was an attack by insinuation and innuendo on Adkinson's character and tended to

portray him as a greedy and vexacious person, thereby impairing his credibility with the jury and the court. The jury, of course, has not had the opportunity to expose the impact of the innuendo on it, but the court, at the time of sentencing, commented adversely about Adkinson:

> And there is substantial evidence that Mr. Adkinson knew that, concerning the Public Land Order Withdrawal for public access was in the vicinity of where Steven was shot (RT 1942).

Nevertheless, the Alaska Supreme Court, commented,

> [W]e do not believe that it had an appreciable effect of the jury's verdict. Adkinson v. State, supra at 533.

Surely, however, the false evidence had an effect of Adkinson's credibility. In such circumstances, a court of appeals has held that even where such false evidence applies only to the jury's estimate of truthfulness and reliability of a given witness, it well may be determinative of guilt or innocence, Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979). Thus, the Alaska Supreme Court has adopted a different standard than that adopted by a circuit court of appeals. Another court of appeals has held that the failure of the prosecution to correct oral testimony which it knows to be false violates due process if there is any reasonable likelihood that the

false testimony could have affected the judgment of the jury, United States v. Barham, 595 F.2d 231 (5th Cir. 1979). Many other courts have recognized that insinuation and innuendo about collateral matters have a tendency to engender prejudice and to render a trial unfair, United States v. Callanan, 450 F.2d 145, 151 (4th Cir. 1971); Hockaday v. Red Line, Inc., 174 F.2d 154, 156 (D.C. Cir. 1949); United States v. Morris, 568 F.2d 396 (5th Cir. 1978).

In the trial of this case, Adkinson's credibility was of the utmost importance. The insinuation about his character through introduction of false evidence regarding his homestead boundary had a reasonble likelihood of affecting the judgment of the jury and therefore denied Adkinson due process of law. In ruling on this matter, the Alaska Supreme Court should have applied the same standards and principles as have been applied by the other courts in the cases cited above.

C. THE IMPROPER ADMISSION OF EVIDENCE OF ALLEGED SIMILAR ACTS DEPRIVED ADKINSON OF DUE PROCESS OF LAW

The question of whether or not Adkinson pointed the shotgun where he did intentionally or without accident or mistake was not an issue. Adkinson never contended that he did not intend to point the gun where it was pointed. His contention was that it was not pointed at Butts until Butts grabbed it and

caused it to be pointed at him. In the first ruling on the defense objection to evidence of similar acts, the court candidly stated that the evidence would be admitted to show Adkinson's "habit" in dealing with trespassers (RT 891) and that he did what he did on that occassion by "habit" (RT 894). Subsequently, the court stated that the evidence would be admitted to show absence of mistake or accident. The court reasoned that if Adkinson habitually pointed guns at people, he could have done so on this occasion. But the court missed the real issue, which was whether the gun became pointed at Butts by an act of Adkinson, or by an act of Butts.

Since intent, mistake and accident were not at issue, the evidence of any similar acts was irrelevant and totally lacking in probative value except to the extent it was pursuasive that the accused was by propensity a probable perpetrator of the crime charged. Thus, in admitting the evidence of the two alleged similar acts, the trial court admitted it for the very purpose which has been most soundly condemned by this court and others, Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213 93 L. Ed. 168 (1948); United States v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977); United States v. Webb, 466 F.2d 1352, 1353 (9th Cir. 1972), and proscribed by Fed. R. Evid. 404(b) as well as by Alaska R. Evid. 404(b).

Furthermore, the trial court's ruling on the admissibility of the similar acts was made

before Adkinson testified. Therefore, the similar act evidence could not have been admitted for the purpose of rebuttal at that time, and since the law of the case had already established that the similar act evidence would be admitted in the trial, there was no reason for Adkinson to limit his denials when he took the witness stand.

Since the similar act evidence was admitted only for the purpose of showing Adkinson's moral predisposition or habit and therefore his propensity to commit the crime in question, the trial court's ruling and the Alaska Supreme Court's approval of that ruling contravenes the law established by this court, the applicable rules of evidence, and the holdings of other courts.

VI
CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinon of the Alaska Supreme Court.

Respectfully submitted August 1, 1980,

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APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ALASKA

JAMES RODNEY ADKINSON,	)	
	)	
Appellant,	)	
	)	Supreme Court
vs.	)	No. 3506
	)	
STATE OF ALASKA,	)	ORDER
	)	
Appellee.	)	
	)	

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.

On consideration of the petition for rehearing lodged May 19, 1980 and filed May 29, 1980,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska, on June 5, 1980.

CLERK OF THE SUPREME COURT

(signed)
ROBERT D. BACON

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF ALASKA

JAMES RODNEY ADKINSON, Appellant, vs. STATE OF ALASKA, Appellee.	)	File No. 3506 OPINION No. 2090. May 9, 1980

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: A. Lee Petersen, Anchorage, for Appellant. David Mannheimer, Assistant Attorney General, Anchorage, Avrum M. Gross, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.

MATTHEWS, Justice.
RABINOWITZ, Chief Justice, concurring,. joined by BOOCHEVER, Justice.

James Adkinson was charged in a two-count indictment with the offenses of manslaughter under AS 11.15.040[1] and negligent homicide under AS 11.15.080.[2] Both charges arose from an incident which occurred on October 10, 1976, when Steven Butts, his brother, David, and a friend, Jim Leonard, were returning to their truck after an overnight camping trip along the Knik River. They had cut across Adkinson's land, and as they approached his cabin, Adkinson, armed with a shotgun, walked out to meet them. He told them that they were trespassing on his land, and that he wanted them to turn around. After a brief verbal exchange between Steven Butts and Adkinson, Adkinson's gun discharged, striking Butts at close range and killing him.

Adkinson was tried before a jury, which returned verdicts of guilty of manslaughter and not guilty of negligent homicide. The

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1. AS 11.15.040 provides:
Except as provided in §§ 10-30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.

2. AS 11.15.080 provides:
Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly.

court sentenced Adkinson to ten years imprisonment with the possibility of parole left to the discretion of the parole authorities.

On appeal, Adkinson raises five issues:

(1) Did the trial court err in admitting evidence or prior similar acts?

(2) Did the trial court err in admitting evidence regarding the boundaries to Adkinson's homestead?

(3) Was there destruction of possibly exculpatory evidence by the investigating officer which violated Adkinson's right to due process?

(4) Did the trial court err in refusing to grant Adkinson's motion for a new trial?

(5) Was the sentence imposed on Adkinson excessive?

We find that the trial court did not err on any of these issues and affirm the conviction.

I

EVIDENCE OF PRIOR SIMILAR ACTS

At trial, prosecution and defense witnesses offered differing accounts of how the shooting occurred. Butts' two companions testified that Adkinson was upset as he approached them, and that although they were conciliatory, Adkinson was belligerent, waving his shotgun around, and eventually, when he was within inches of Steven Butts, pointing the gun directly at him moments before it discharged. Adkinson took the stand in his own defense and denied pointing his gun at Butts. Both Adkinson and his wife testified that the weapon was pointed to the side of Butts. Adkinson testifies that Butts was

agitated, "building himself up into a frenzy," and attempted to grab the weapon from Adkinson's hands, thereby pulling it towards himself when it discharged.

The Adkinsons also testified that Adkinson was very careful in the use of weapons, would never point a gun at another person, and had never done so. On rebuttal, the prosecution offered the testimony of two wittnesses who described two separate incidents when Adkinson pointed a gun at suspected trespassers on his land. Adkinson objected to the admission of this evidence on grounds of irrelevance and prejudice, but the trial court ruled against him.

Adkinson's first claim on appeal is that the admission of evidence of purported prior similar acts towards trespassers was error because it was character evidence, which is prohibited by Alaska Rule of Evidence 404(b)[3] except in certain specific cases which do not apply here. He contends that the introduction of the evidence was for the purpose of portraying him as a person with a predisposition to commit this sort of crime.

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3. Alaska R. Evid. 404(b) provides:
Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

It is beyond dispute that where evidence of other crimes or acts is relevant only to prove one's character, to show that on the occasion in question he acted in conformity with that character, it is not admissible.[4] This is because of the unfair impact such evidence tends to have. It may give rise to a persuasive inference that the defendant is guilty of the crime charged because he is a bad person. When this occurs, the defendant has been effectively denied his right to defend against the particular crime with which he is charged.[5]

However, it is equally well-established that where the evidence of prior crimes or acts is relevant to a material fact in the

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Alaska R. Evid. 404(b):

See also, Oksoktaruk v. State, _____ P.2d _____, Opinion No. 2089 (Alaska 1980); Freeman v. State, 486 P.2d 967, 975-76 (Alaska 1971); Watson v. State, 387 P.2d 289, 293 (Alaska 1963); C. McCormick, Law of Evidence §190, at 447 (2d ed. 1972); 1 Wigmore on Evidence § 193, at 643 (3d ed. 1940); 1 C. Torcia, Wharton's Criminal Evidence § 240, at 528, 531 (13th ed. 1972).

5. See Michaelson v. United States, 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-174 (1948); Oksoktaruk v. State, _____P.2d _____, Opinion No. 2089 (Alaska 1980); Freeman v. State, 486 P.2d 967 (Alaska 1971).

The danger is enhanced where the other acts also constitute criminal offenses for which the defendant was not charged, for then he may be convicted because of those offenses rather than because he is guilty of the one with which he is charged.

case at trial, it does not fall within the prohibition.[6] This court has admitted evidence of other crimes, wrongs, or acts where it has been offered to prove motive,[7] intent,[8] identity[9] or has "set the stage" for the crime being tried.

In this case, the prosecution called two witnesses. The first was Tommy Banks, a surveyor who testified that he and an associate had gone out to Adkinson's homestead to survey land. Adkinson appeared at their rear, and asked them what they wanted. Banks turned to see Adkinson armed with an upraised shotgun pointed at him, which was lowered after Banks explained his presence. The second witness was William Blessington, who was crossing Adkinson's land with a man and his young son on their way to the river when they met

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6. Alaska R. Evid. 404(b); Frink v. State, 597 P.2d 154, 169 (Alaska 1979); Eubanks v. State, 516 P.2d 726, 729 (Alaska 1973).

7. See Frink v. State, 597 P.2d at 170; Gafford v. State, 440 P.2d 405, 408 (Alaska 1968), cert. denied, 393 U.S. 1120, 22 L. Ed. 2d 125 (1969).

8. See Demmert v. State, 565 P.2d 155, 157 (Alaska 1977).

9. See Thessen v. State, 454 P.2d 341, 353 (Alaska 1969), cert. denied, 396 U.S. 1029, 24 L. Ed. 2d 525 (1970).

10. See Braham v. State, 571 P.2d 631, 640 (Alaska 1977), cert. denied, 436 U.S. 910, 56 L. Ed. 2d 410 (1978); Dulier v. State, 511 P.2d 1058 1061 (Alaska 1973).

Adkinson about seventy yards away. Adkinson had a shotgun which he discharged above their heads, and as he approached them, he shouted at them to get off his land. When Blessington's companion asked if they could cross his land to reach the river, Adkinson brought his shotgun to within a foot of the companion's face, pointing it at him, and demanded that they leave immediately.

The trial judge ruled that this evidence regarding prior confrontations between Adkinson and trespassers was relevant to show that Adkinson's pointing of his shotgun at Butts was not accidental or inadvertent.[11] We agree with this determination. Here, unlike the situation presented in Oksoktaruk v. State, _____ P.2d _____, Opinion No. 2089 (Alaska 1980) and Eubanks v. State, 516 P.2d 726, 729 (Alaska 1973), Adkinson's prior acts are "so related to the crime charged in point of time or circumstances that evidence thereof is significantly useful in showing the

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11. Alaska R. Evid. 404(b) states that evidence of other crimes, wrongs, or acts may be admissible to prove, inter alia, "absence of mistake or accident." Adkinson's defense that he did not point the gun at Butts, but rather Butts pulled the gun towards himself essentially is a claim that the gun came to be pointed at Butts by accident, rather than intentionally. See also, McCormick, note 4 supra, § 190 at 450; 22 C. Wright & K. Graham, Federal Practice & Procedure §5247, at 517 (1978); 2 Wigmore note 4 supra § 302 at 196.

defendant's intent in connection with the crime charged."[12] However, this does not end the inquiry. As we stated in Eubanks v. State, 516 P.2d 726, 729 (Alaska 1973), "[e]ven when such evidence is relevant, the probative value must outweigh its prejudicial impact."[13] This is a question which is left to the trial court's discretion, and reversal is required only where it is found that the trial court has abused that discretion.[14]

It cannot be denied that the testimony by Banks and Blessington was highly damaging to the defense. The evidence was probative of a material fact in this case, i.e., whether Adkinson intentionally pointed his gun at Butts. The testimony itself was clear and convincing. It rendered Adkinson's version of the incident much less believeable in a case

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12. Oksoktaruk v. State, ____ P.2d ____, Opinion No. 2089 at 8 (Alaska 1980) quoting 1 C. Torcia, Wharton's Criminal Evidence § 245, at 556 (13th ed. 1972).

13. (Citations omitted). Alaska R. Evid. 403 provides in part:

> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . .

14. Ladd v. State, 568 P.2d 960 968 (Alaska 1977), cert. denied, 435 U.S. 928, 55 L. Ed. 2d 524 (1978).

which largely turned upon his credibility and that of the other witnesses. While there is always a danger of jury misuse of this sort of evidence, in this case the evidence was not of the type to arouse the jury to "overmastering hositility."[15] We cannot find that the trial court abused its discretion in admitting the evidence.

The defense contends that even if the evidence was admissible, the trial court erred in failing to give a limiting instruction regarding its proper use to the jury. There is no merit to this claim. Absent a finding of plain error,[16] which Adkinson does not urge, appellant's failure to request a limiting instruction at trial waived that claim.[17]

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15. See McCormick, note 4 supra, § 190 at 453. See also Commentary, Alaska R. Evid. 403, at 62 (1979), which suggests that "unfair prejudice" in this context, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

16. Alaska R. Crim. P. 47(b).

17. Alaska R. Evid. 105 provides in part:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. [Emphasis added].

See also, Frink v. State, 598 P.2d at 170.

II

EVIDENCE OF ADKINSON'S HOMESTEAD BOUNDARIES

Extensive testimony was presented at trial concerning the formal boundaries of Adkinson's homestead. The state's theory in introducing this evidence was that the boundaries were questionable, Adkinson was aware of this, and thus also aware that perhaps Butts and his companions were not in fact trespassers on his property. The thrust of such a conclusion would purportedly be to call into question the reasonableness of Adkinson's reaction to the victim's presence, which would be relevant to the negligent homicide count.

Adkinson contends that the evidence was irrelevant and highly prejudicial, serving primarily to portray the defendant as "a greedy and vexatious person who acted in bad faith."

Although we have difficulty understanding the relevance of this evidence, and it is unfortunate that so much time at trial was consumed in the dispute over the homestead boundaries, we do not believe that it had an appreciable effect on the jury's verdict. The jury found Adkinson not guilty of Count II, negligent homicide, and guilty of Count I, manslaughter, which required a finding that Adkinson pointed his gun at Butts, an act that was unlawful under the circumstances regardless of whether Butts was a trespasser. Therefore, any error with regard to the

admission of the homestead boundaries evidence would be harmless.[18]

III

DESTRUCTION OF POSSIBLY EXCULPATORY EVIDENCE

State Trooper Gary Lewis, one of the first officers to arrive at the scene of the shooting, took possession of Adkinson's shotgun. At trial, he testified that he handled the weapon before it was sent for analysis to a fingerprint expert, John Sauve. Upon examination of the gun, Suave found only Trooper Lewis' prints, near the end of the barrel.

Adkinson contends that Trooper Lewis' handling of the shotgun destroyed any fingerprints that might have been on the gun. Since is is the central claim of his defense that Butts grabbed the gun and pulled it towards himself before it discharged, Adkinson contends that the presence of Butts' fingerprints on the gun was "absolutely crucial to the question of his guilt or innocence," and

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18. See Alaska R. Crim. P. 47(a); Love v. State, 457 P.2d 622, 631 (Alaska 1969).

that the state's alleged destruction of this exculpatory evidence denied him due process of law.[19]

We do not agree. Although Lewis admitted handling the barrel of the gun while taking it out of his car at the police station, the evidence was conflicting as to whether he had otherwise touched the barrel. He denied doing so.

Moreover, while the presence of Butts' fingerprints on the shotgun barrel would have

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19. U.S. Const. amend. V; Alaska Const. art. I, §7

Adkinson also claims that the state's failure to preserve the backpacks worn by Butts and his two companions also denied him due process, for the backpacks' contents may have contained weapons or other evidence that would have affected the boys' credibility at trial. Additionally, he claims that the size of Butts' pack was pertinent to the witnesses' ability to observe the incident. We find no merit to these arguments. Butts' pack was produced at trial for the jury to examine, and we cannot see that the contents of the pack were relevant to any of the disputed issues. What we said in Nicholson v. State, 570 P.2d 1058 (Alaska 1977) is pertinent here: Adoption of appellant's views would impose an extremely difficult burden on the state to preserve intact almost every physical detail of a crime scene. Here the investigators of the homicide had no indication of the relevance of either the tire or the furnace at the pertinent times during their investigation. Nor is there any indication that the failure to preserve these items was other than a result of good faith determination during the course of a crime investigation. 570 P.2d at 1064.

corroborated Adkinson's version of the shooting in part, it would not have been exculpatory in itself. Even if Butts had grabbed the shotgun, if it had been pointed at him, Adkinson would have been guilty of manslaughter, and the presence of Butts' prints would not prove that Adkinson did not point his weapon at Butts.

Finally, any mishandling on the part of the police was unintentional. Trooper Lewis testified that he didn't think to preserve the gun for fingerprints until after he had brought the gun to the police station and dismantled it. Under these circumstances, we do not find a failure of due process.[20]

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20. See Catlett v. State, 585 P.2d 553, 557-58 (Alaska 1978); White v. State, 577 P.2d 1056, 1060 (Alaska State, 519 P.2d 788, 796-97 (Alaska 1974).

IV

DENIAL OF MOTION FOR A NEW TRIAL

Pursuant to Alaska Rule of Criminal Procedure 33[21] Adkinson moved for a new trial after the verdict was reached, on the ground that the admission of defendant's prior similar acts deprived him of a fair trial. The trial court denied the motion. After Adkinson was sentenced, the defense renewed the motion, this time predicated on allegedly newly discovered evidence, which consisted of the reports of a polygraph expert and a voice stress analysis expert which purported to show that the Adkinsons had truthfully testified at trial. The trial court denied this motion on the ground that the reports were not newly discovered evidence within the meaning of Alaska Rule of Criminal Procedure 33, citing Rank v. State. 382 P.2d 760, 761 (Alaska 1963). The trial court also denied

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21. Alaska R. Crim. P. 33 provides:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilt, or within such further time as the court may fix during the 5-day period.

Adkinson's motion as not required in the interests of justice. We find no error.

Our resolution above of the prior similar acts issue disposes of appellant's first argument. In Rank we enumerated the requirements that a motion for a new trial based on newly discovered evidence must meet:

> (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relief on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal.

382 P.2d at 760.[22] The trial court denied the motion because defendant waited until after the jury had returned its verdict before conducting the evaluations, presumably concluding that the second requirement was not met. Defense counsel explained that he had not sought the evaluations sooner because he had not realized the critical role that would be assigned to his client's credibility, and because he feared that his own performance as counsel would be impaired by adverse test results.

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22. Quoting Salinas v. State, 373 P.2d 512, 514 (Alaska 1962).

A motion for a new trial based on a claim of newly discovered evidence falls within the sound discretion of the trial judge and will only be disturbed on appeal if there is an abuse of discretion. Johnson v. State, 501 P.2d 762, 765 (Alaska 1972).[23] We conclude that the trial judge's decision was not an abuse of discretion.[24]

V

SENTENCE

The trial court sentenced Adkinson to ten years imprisonment with the possibility of parole left to the discretion of the parole board. Adkinson's final point on appeal is that this sentence is excessive.

In imposing sentence, the trial court concluded that a severe sanction would be necessary to give effect to the goals of criminal sanctions as articulated in State v. Chaney, 477 P.2d 441 (Alaska 1970). We have examined the sentencing proceedings and we believe that the trial judge gave thoughtful consideration to the facts of this case and the Chaney sentencing criteria. We conclude that in imposing the sentence it did, the trial court was not clearly mistaken.

AFFIRMED

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23. See also Darling v. State, 520 P.2d 793, 795 (Alaska 1974); Ladd v. State, 568 P.2d at 970.

24. We need not reach the question of the admissibility of the polygraph and psychological stress evaluations at trial. See generally, Pulakis v. State, 476 P.2d 474, 479 (Alaska 1970).

RABINOWITZ, Chief Justice, concurring, joined by BOOCHEVER, Justice.

I concur in the court's resolution of the evidence of prior similar acts issue, but believe that the questioned evidence was also properly admissible for impeachment purposes.[1]

This court has expressed previously in dicta its approval of prosecutorial use of evidence which contradicts an accused's testimony. In Freeman v. State, 486 P.2d 967 (Alaska 1971), a case involving the admissibility of an accused's prior conviction, we acknowledged in a footnote that although the defendant may not be found to have opened the door to past acts of misconduct by putting his character in issue,

> An altogether different situation arises where the accused, instead of generally contending that his character is inconsistent with the type of offense with which he is charged, affirmatively denies ever having been in trouble, or makes specific claims as to his conduct on certain occasions in the past. In such cases, evidence of misconduct by the accused has frequently been held admissible in order to directly

1. Louisell and Mueller, 3 Federal Evidence §343 (1979); McCormick, Handbook of the Law of Evidence §47 (2d Ed. 1972).

> contradict the specific claims of the accused. See, e.g., United States v. Bowe, 360 F.2d 1 (2d Cir. 1966); United States v. Beno, 324 F.2d 582, 588 (2d Cir. 1963); People v. Goff, 100 Cal. App. 2d 166, 223 P.2d 27, 30 (1950; Molton v. People, 118 Colo. 147, 193 P.2d 271, 272-273 (1948); Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584 (1954); State v. Hale, 21 Ohio App.2d 207, 256 N.E.2d 239 (1969); State v. Fiddler 57 Wash.2d 815, 360 P.2d 155, 158 (1961).[2]

Id. at 976 n.23.

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2. In Demmert v. State, 565 P.2d 155 (Alaska 1977), then Chief Justice Boochever remarked in a concurring opinion, joined by Justice Dimond, that the introduction of a prior similar act was permissible to impeach the defendant's testimony that he had never committed such an act before.

> The statement by Mr. Demmert that 'I'd never do anything like that' was made as a denial of the acts for which he was accused. It is reasonable to infer from this language that Demmert was indicating he would not do such an act in the future and that he would not do such an act in the past. It was therefore permissible for the District Attorney to impeach on the question of whether he had done such an act in the past to refute the implications of Demmert's own statements.

Id. at 158.

Once Adkinson took the stand and testified on direct examination[3] that he would never point a gun at another person, the state could rebut that evidence as it did by offering the testimony of two witnesses who

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3. Since I am assuming arguendo that this evidence does not come in under the "lack of accident and mistake" exception of Alaska R. Evid. 404(b), the general rule excluding prior bad acts applies. In that circumstance, the evidence must have been brought out on direct examination to allow impeachment by contradiction.

> [W]ith respect to evidence excludable under some specific provision in the Rules of Evidence, or some statutory or constitutional principle, a denial by the witness paves the way for contradiction through the use of such evidence only if the denial came out on direct examination of the witness. If it were otherwise, if excludable evidence were allowed to contradict the denial of a witness on cross-examination, the result would be to reduce the rule of exclusion to a hollow shell: Either the witness would concede the point on cross-examination, in which case the excludable evidence would be effectively before the trier of fact, or he would deny the point on cross-examination, in which case too the excludable evidence would be received, this time to contradict. While the purpose would still be limited, at least in the latter instance, the party for whose benefit the exclusionary rule was designed would altogether lose the power to claim most of its protection.

Louisell and Mueller, 3 Federal Evidence § 343, at 500-01 (1979).

described two separate incidents in which Adkinson had pointed a gun at people. Such evidence was far from collateral.[4]

Adkinson's credibility was central to the case -- as in many cases when the accused takes the stand. Were the jury to retire with the impression that Adkinson had never pointed a gun at another person, the prosecution's case would have been substantially weakened. Such a denial going to a crucial element of the crime is of sufficient importance to allow rebuttal.

Thus, I conclude impeachment is a sufficient independent basis to support introduction of this evidence.

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4. The only limit placed on impeachment by contradicition is that the subject of the impeachment not be collateral. McCormick, Handbook of the Law of Evidence § 47 (2 Ed. 1972; Lempert and Saltzburg, A Modern Approach to Evidence 312 (1977).

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,)
)
Plaintiff)
)
vs.)
)
JAMES RODNEY ADKINSON,)
)
Defendant.)
)
No. 76-6550 Criminal

JUDGMENT AND COMMITMENT

The defendant came before the Court on this 12th day of May, 1977, with his counsel, Gail R. Fraties, Esq., and the District Attorney was present. The defendant was given a full opportunity to make a statement in his own behalf, and the Court being fully advised,

IT IS ADJUDGED that the defendant has been convicted after trial by jury of the offense of Manslaughter in violation of AS 11.15.040 as charged in the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Commissioner of the Department of Health and Social Services of the State of Alaska or his authorized representative for a period of Ten (10) years with parole at discretion of Parole Board.

Any defendant who has received a sentence of more than one year may appeal the sentence on the ground that it is excessive. Upon such appeal made by a defendant, the Supreme Court of Alaska may increase or decrease the sentence and sentence the defendant to any term which might have been imposed by the trial judge.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the appropriate officer or other authorized person, and that the copy serve as the commitment of the defendant.

DATED at Anchorage, Alaska, this 12th day of May, 1977.

Victor D. Carlson
Judge of the Superior Court